87-1566

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL J. GUINAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

At issue in this case is the judicial abrogation of an accused's constitutional right to cross-examination. The special and critically important questions which must be answered are:

1. Did the court of appeals render a decision in conflict with decisions of other courts of appeals when it ruled that hearsay grand jury testimony of a non-available witness is admissible at trial pursuant to provisions of Rule 804(b)(5), Federal Rules of Evidence?

   (a) Does constructive corroboration meet the requirements of "circumstantial guarantees of trustworthiness?"

2. Was the court of appeals revisionist decision in conflict with this Court's decisions concerning hearsay testimony and the Confrontation Clause, thus calling for an exercise of this Court's power of supervision?

   (a) Is constructive corroboration sufficient to overcome this Court's well-established rule that hearsay is "presumptively unreliable" absent stringent indicia of reliability?

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Petitioner, Michael J. Guinan, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 7, 1988.

OPINION BELOW

The opinion of the Court of Appeals is reported at 836 F.2d 350 and is reproduced in the Appendix. (App. 1-17).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on January 7, 1988. (App. 18).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Confrontation Clause of the Sixth Amendment to the United States Constitution, which provides that in criminal prosecutions

> *"the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."*

2. This case also involves Rule 804(b) of the Federal Rules of Evidence, which provides for hearsay exceptions (App. 19).

STATEMENT OF THE CASE

A four-count indictment filed April 27, 1984, charged the defendant, Michael J. Guinan, with filing false income tax returns for the tax years 1977, 1979, 1980, and 1981, in violation of Title 26, United States Code, Section 7206(1).

As a direct result of the testimony of the defendant's wife, Lori Clarke Guinan, before the grand jury, a superseding indictment was filed on September 20, 1984, adding similar charges for the tax years 1978 and 1982. A second superseding indictment the following May added

charges of perjury, bail jumping, and fraudulent use of a social security number. (18 U.S.C. Sec. 1623, 18 U.S.C. Sec. 3146(a)(1), 42 U.S.C. Sec. 4081(g)(2).

At trial of the case, Lori Guinan was an unavailable witness, and her testimony was admitted into evidence under Rule 804(b)(5) of the Federal Rules of Evidence. At the conclusion of the trial, the jury found the defendant guilty of the tax, bail jumping, and social security charges, and not guilty of the two counts charging perjury. He was sentenced to sixteen years in prison.

During the course of the grand jury investigation leading to return of the original indictment against the defendant, a subpoena was served on the defendant's girlfriend, Lori Clarke. On September 23, 1983, Lori Clarke appeared before the grand jury and claimed her privilege against self-incrimination. In January, 1984, Lori Clarke was married to the defendant. Differences arose between her and the defendant, and in early August, 1984, the defendant evicted her from the condominium they shared. (T/M 98). On August 16, Lori Clarke, now Lori Guinan, called the Internal Revenue Service, and spoke with Special Agent Patrick McDermott. (T/M 14). She gave McDermott information about the defendant's finances, and thereafter met or spoke with him several times before giving testimony before the grand jury. (T/M 15, 111).

Based on his notes, taken during interviews and phone conversations with Lori Guinan, McDermott prepared the statement that she read to the grand jury. (T/M 23). The statement took him five to ten hours to prepare and was in his terminology and phraseology. (T/M 110). The witness echoed McDermott's words.

Shortly before the case was set for trial, the government determined Lori Guinan was an unavailable witness and gave notice to defendant pursuant to Rule 804, Federal Rules of Evidence, that it intended to offer into evidence

at trial the grand jury testimony of Lori Guinan. Defendant filed a Motion *in Limine*, which asked the trial court to exclude it. Agent McDermott was the only witness called by the government to present evidence in support of admissibility of the grand jury transcript. After an extended hearing, the trial court, albeit reluctantly, decided to admit a redacted version of the transcript pursuant to 804(b)(5). (App. 20, 21).

Mid-trial, an IRS agent named Helene Seltzer appeared as a government witness to read the Lori Guinan grand jury transcript. We have reproduced Agent Seltzer's reading for the jury in the Appendix. (App. 20-24).

The grand jury testimony was critical to the government's case and devastating to the defendant's, particularly in light of the government's elected methods of proof. For the years 1977 through 1980 the government relied upon an expenditures computation to prove understatement of income, while for the years 1981 and 1982 a specific item method was utilized centering about defendant's failure to report interest income earned on six investment accounts during those two years.

Lori Guinan's grand jury testimony provided either the only evidence of expenditures or evidence crucial for a finding of guilt. Only her testimony supported the government's charge of support, allowance, and travel expenditures. Only her testimony supported the government's charge that the defendant paid cash to two condominiums, unit 3805 in 1977 and unit 5108 in 1980.

Corroboration in the instant case is a fiction, the product of the imagination of IRS agent McDermott. The grand jury proceedings and the corroboration testimony presented at the hearing were a one man show. McDermott testified through the mouth of Lori Guinan before the grand jury, and he testified for alleged corroborating witnesses at the hearing. IRS agent McDermott controlled the show from beginning to end.

At the *in Limine* hearing, the defendant found himself in a precarious and peculiar situation. He could not cross-examine the grand jury statement, nor the witness who proffered hearsay within hearsay to corroborate it. None of the things traditionally and routinely found wrong with a witness' testimony could be explored for and demonstrated by cross-examination. An exhaustive analysis of the trustworthiness of the witness and the facts proffered in corroboration of the grand jury testimony is undertaken herein because they are the underpinnings of the Appeal Court's opinion. We feel the only way the Court's revisionist attitude, as demonstrated by deviation from law enunciated in Seventh Circuit and Supreme Court authorities, can be shown is by exposing McDermott's testimony for what it was: unfounded hearsay within hearsay which provided no independent corroboration for the generalized statements contained in the grand jury testimony.

GRAND JURY STATEMENT AND ANALYSIS OF PROFFERED CORROBORATING EVIDENCE:

In the following pages the grand jury testimony is analogized by section with the evidence presented by prosecutors in support of it and then with evidence which demonstrates a total failure to corroborate by independent evidence which has indicia of reliability. The portions of Lori Guinan's grand jury testimony read to the jury during trial by IRS agent Seltzer are set out in the Appendix (App. 20-21). The statement begins at App. 20, Section A, with the identification of the witness and testimony concerning her relationship to the defendant.

EVIDENCE PROFFERED TO CORROBORATE STATEMENT:

In its opinion the Appeals Court stated, "The crucial question in considering the effect of Lori Guinan's personal interests on the admissibility of her testimony under

Rule 804(b)(5) is not whether she was a 'mere bystander' but whether she had a motive to lie that calls the trustworthiness of her statements into question." The Court found that "her 'pecuniary interest' did not so seriously undermine the trustworthiness of her testimony that it is inadmissible under Rule 804(b)(5)." (App. 11).

The Court relied primarily on *United States v. Boulahanis*, 677 F.2d 586 (7th Cir. 1982) in its determination of the instant case, but it failed to follow the law enunciated therein, as well as Supreme Court law, and discarded common sense and practical knowledge of human nature when it found Lori Guinan trustworthy.[1]

In *Boulahanis*, the grand jury witness was a non-interested bystander who witnessed the subject event; he had no ax to grind. There was no evidence presented which tainted the credibility of the witness. To the contrary, the grand jury witness in the instant case is shrouded in unreliability and untrustworthiness. She was not a "non-interested bystander." She had a primary interest in the financial affairs of her husband. Moreover, she had a primary interest in the outcome of the prosecution for tax fraud and the jail sentence received by her estranged husband. Who, save the defendant, had a greater interest?

And, unquestionably, Lori Guinan had a vengeful ax to grind. On 8/16/84, when she called the IRS informant line and volunteered financial information about her husband, she had been recently separated from the defendant and that very day evicted from the marital residence. (T/M 132). It's irrational to conclude that the bizzare call and subsequent attempts to provide financial information were intended to do anything but severely injure her defendant-husband. It was sheer vindictiveness and not an exercise

[1] Defendant analogizes *United States v. Boulahanis* and other leading cases on page 21, *infra*.

in pristine civic duty. Another important factor cast a dark shadow over the trustworthiness of the witness as she read McDermott's prepared statement to the grand jury. She had gotten out of jail only a few days before and was seething with anger and vindictiveness. She had been arrested on a complaint by the defendant, which charged her with forcibly breaking into his apartment and stealing numerous pieces of property. (T/M 132). Following are other factors which effect the trustworthiness of the witness and grand jury proceedings.

PREPARED STATEMENT:

Agent McDermott testified at the *in limine* hearing Lori Guinan had telephoned him on the IRS informant line on 8/16/84 and had provided him with information concerning the defendant's income, expenses and financial condition. After the impersonal conversation, McDermott made handwritten notes of the matters discussed and subsequently had those notes typewritten. (T/M 13). There was one more telephone conversation on 8/22, one fifteen minute meeting in a tavern on 8/27, and two other meetings before the grand jury appearance on 9/21. After each conversation with Lori Guinan, McDermott made handwritten memos of the conversation and then had those memos typewritten. Said memos were prepared solely by McDermott, from his recollection and interpretation of the witness allegations, and in his terminology and phraseology, several days after the respective conversations. (T/M 132-134, 137, 175, 190, 205). From these memos, he prepared on 9/20 (without any aid from the witness) a summary statement. This statement, which was his interpretation of what the conversations reflected, became the grand jury testimony. On 9/21/84, Lori Guinan read McDermott's prepared statement to the grand jury, and thus became a robot echoing McDermott's words. This procedure was unique and peculiar to traditional grand jury proceedings. (T/M 101, 102, 104-107).

No excuse or justification was given by the government for not allowing the witness to testify spontaneously, drawing on her own personal knowledge and experience, in the traditional truth seeking procedure. The only inference that can be drawn from this unique and peculiar conduct by the prosecutor's office is that it did not want the witness free to limit, expand on, or recant any of the varied and complex allegations of McDermott's statement. Lori Guinan had only a general idea of her husband's financial affairs. She had no first hand knowledge about specific expenditures, and without being able to read McDermott's prepared statement, her testimony would have been filled with uncertainties. If the statements of Lori Guinan had been true, they could have been easily testified to from personal knowledge. There would have been no need to lay her testimony out in logical sequence and then confine her to the boundaries of the prepared statement.

DIVORCE:

When Lori Guinan testified before the grand jury, she was an estranged and divorcing wife. Property settlement, as well as other pecuniary interests, militated toward the exaggeration of defendant's financial resources, certainly not their minimization.

FAILURE TO APPEAR FOR TRIAL (Not Available):

There was no showing Lori Guinan's unavailability was involuntary, or that the defendant had anything to do with her failure to appear for trial as a witness. It must be presumed she voluntarily refused to appear for trial for her own personal reasons. This fact casts the biggest shadow over her trustworthiness and the propriety and trustworthiness of the grand jury proceedings. It can be inferred from her unavailability that she recanted her grand jury testimony. The defendant stipulated with the

prosecution at the hearing that, if called, U.S. Marshals would testify they made due and diligent efforts to locate Lori Guinan. Neither the stipulation nor the testimony attempted to demonstrate why she did not appear for trial.

STATEMENT RESUMED:

The statement resumes at App. 21, Section B. In this section of the transcript, the witness describes support, allowance, and grocery money given her by the defendant. In an effort to corroborate these statements, agent McDermott testified to the following, and, from his testimony alone, the Appeals Court found sufficient corroboration (App. 12).

He testified that Lori Guinan never filed an individual income tax return (T/M 31), and there was no substantial activity in her bank account between 1977 and 1982. (T/M 35). He further testified that her parents told him that it was their understanding, based on conversations with their daughter, that defendant supported her. (T/M 34). Additionally, McDermott said she stated in a loan application that defendant was her sole source of support (T/M 34), and that she received checks for support from corporations that the defendant controlled. She also allegedly told McDermott that she received $175-250 a week in allowance. Terry Hepp, one of the defendant's law clerks, allegedly told McDermott Lori Guinan had complained to him that she was not getting enough allowance. (T/M 44).

Cross-examination revealed that the corroboration for the alleged support and allowance payment was a fiction. It existed only in McDermott's imagination. Not one witness corroborated by personal knowledge Lori Guinan's statement. Her previous statements, as well as statements by third parties, were used for corroboration. Moreover, McDermott had no personal knowledge of the expendi-

tures described in the grand jury testimony. His testimony consisted of the rankest form of hearsay within hearsay, since all McDermott's testimony was predicated on what other agents told him, or what other individuals told him, or what documents revealed. No foundation was laid to credit (corroborate) the hearsay testimony. It's facetious to find uncorroborated hearsay can be used to corroborate hearsay (grand jury transcript). The same stringent standards should be used to measure the corroboration hearsay as is used to measure the hearsay sought to be corroborated. *Rule 805* (Hearsay within Hearsay), provides that each part of the combined statements must conform to an exception to the hearsay Rule.

McDERMOTT'S TESTIMONY ON CROSS-EXAMINATION:

McDermott testified Lori Guinan told him she got checks and cash in payment of support and allowances. No checks were introduced into evidence. If they had existed and corroborated the statement, they would have been easy to produce. There was no testimony concerning the number of checks received, the purpose of the check (allowance or otherwise), the year issued, or the amount they were written for. (T/M 125).

McDermott testified he had no idea and could not corroborate the amount of cash Lori Guinan claimed she received. There were no records or witnesses who had personal knowledge of the alleged cash payments by defendant. Moreover, McDermott admitted that the $175-250 payment was his estimate, which was based on his notes of interviews. He concluded: ". . . sometimes it was less, sometimes more, sometimes weeks would be skipped." In spite of the foregoing, McDermott arbitrarily concluded the defendant gave Lori Guinan $9,100 a year for four years ($175 × 52). This figure was charged as an expenditure for the years 1977 through 1980. (T/M 126, 138).

Given the opportunity on cross-examination to corroborate cash expenditures by the defendant, McDermott demonstrated he was unable to corroborate one cent of alleged expenditures for allowance and support. He stated it was impossible to trace the cash allegedly received from the defendant or how it was spent. "Since cash was hard to trace, we could not come up with an exact dollar amount." (T/M 127, 128).

McDermott testified Lori Guinan never filed tax returns and this was corroboration the defendant supported her. His information came from the August 22, 1984 interview with Lori Guinan, wherein she stated she never filed a tax return. There were no records from the IRS introduced into evidence and no other corroborating evidence. Assuming, *arguendo*, the statement was true, the fact Lori Guinan didn't do something is not corroboration the defendant did do something. The connection between his failure to file tax returns and the defendant providing support is too remote. (T/M 31, 32).

McDermott testified that the lack of activity in Lori Guinan's checking account was corroboration for the statement defendant supported her. Like the failure to file tax returns, negative evidence should not be used to corroborate hearsay. It does not meet the test for reliability. (T/M 35).

McDermott testified Lori Guinan's parents told him that their daughter had told them the defendant had supported her. No foundation was given for this hearsay. Even the trial judge found the foregoing corroboration weak. (T/M 32). At best, this is corroboration by previous consistent statement.

McDermott testified he corroborated the alleged grocery expenditures by seeing a couple of checks payable to Treasure Island grocery store. He did not know what the checks were in payment of, or the amounts, or month or

year issued. No checks were admitted into evidence. He admitted he could not corroborate the alleged cash payments. (T/M 138-140).

STATEMENT RESUMED:

The statement resumes at App. 21, 22, Section C, with the witness describing travel and vacation expenditures for the years 1977 through 1982.

CORROBORATING EVIDENCE FOR TRAVEL EXPENDITURES:

The Appeals Court found Lori Guinan's testimony regarding the couple's travels was corroborated by the *log book for one of the defendant's boats, by defendant's own sworn statement in a divorce proceeding, by entries on a calendar kept by an ex-wife, by telephone records of the defendant's office showing collect calls from the Caribbean, by credit card records, and by statements by defendant's receptionists, secretaries, law clerks, and friends.* (App. 12).

McDermott's testimony was the only testimony offered for corroboration of above, and from it Appeals Court found sufficient corroboration. The following testimony elicited on cross-examination demonstrates the abject lack of corroboration.

Logbook. McDermott testified the logbook, from one of defendant's boats, was corroboration for 1979 expenditures. It was not introduced into evidence, nor were any back-up records. No effort was made to corroborate Lori Guinan's statement of expenditures by specific entries in the logbook. McDermott's testimony was nothing more than his biased opinion of what the logbook purported to reveal. (T/M 203).

Shopping Expense. The Appeals Court found sufficient corroboration for this alleged expenditure even though Mc-

Dermott admitted on cross-examination he could find *no corroboration for this portion* of the grand jury statement. (T/M 204).

Alleged trips and expenditures for 1980, 1981, 1982. McDermott admitted during examination there was *no corroboration for Lori Guinan's statement.* (T/M 190).

Expenditures for 1977 and 1978. McDermott testified there was *no corroboration for Lori Guinan's statement* concerning expenditures for trips in 1977 and 1978. (T/M 191, 192).

Gambling. McDermott admitted he knew of *no corroboration for Lori Guinan's statement* concerning gambling expenditures. He said, "I'm not sure of corroboration; it could have been credit cards." (T/M 191, 194, 196).

Credit Cards. When McDermott was asked what corroboration existed for various expenditures, he replied, "We have some credit card purchases." No effort was made to determine what the credit card charges were for, and no records were introduced into evidence. He said there were less than five charges made, and those charges were for $80 to 100. He admitted he was uncertain what Lori Guinan told him about the frequency of the trips. (T/M 199, 200, 202).

Secretaries. McDermott testified he interviewed three secretaries who had worked for the defendant and they told him they had purchased airline tickets for the defendant and Lori Guinan. No airline tickets were introduced into evidence, no date of purchase was provided, no expenditure given. (T/M 37-42, 196, 197). Once again this hearsay within hearsay fails to corroborate by independent evidence. The same scenario exists for the alleged *law clerk* corroboration. The hearsay within hearsay did not state when and where the defendant traveled or the amount of money spent.

STATEMENT RESUMED:

The statement resumes at App. 23, Section D, with the witness describing the purchase of a condominium (Unit 3805) by the defendant with cash.

CORROBORATION FOR PURCHASE OF UNIT 3805 WITH CASH:

The Appeals Court stated that Lori Guinan grand jury testimony regarding the purchase of unit 3805 was corroborated by a title history and McDermott's testimony regarding the purchase funds. (App. 13). Once again, the court relied on unfounded hearsay within hearsay. The alleged title history was nothing more than McDermott's opinion of what a title search revealed. It should be noted the defendant was charged with understating gross income, and that the prosecution chose the "expenditures method" to prove its case. The probative value of the grand jury testimony was not to show ownership but to show the unit was purchased with cash. The government's charge that the defendant purchased unit 3805 with cash in 1977 rested solely on the grand jury testimony. Ironically, McDermott's testimony not only failed to corroborate the cash purchase but demonstrated clearly it was bought with cashier checks and there was no evidence of cash.

CROSS-EXAMINATION REVEALED THE FOLLOWING:

1. The testimony concerning the title history of unit 3805 was nothing more than McDermott's unfounded opinion. The title history—records and documents—were never introduced into evidence. There was no independent evidence which showed who purchased unit 3805, on what date, or for what amount, or in what manner it was paid for—cash or check.

2. McDermott testified of the $54,000 purchase price, only $683.18 was paid in cash. The balance was paid in

cashier checks, in accordance with the commonly required way of closing real estate deals. (T/M 141, 142). When asked what the corroboration was for cash purchase, McDermott answered, "We feel there was money obtained from safe deposit boxes and used for cashier checks. (T/M 141). When he was asked if cash was used or check for purchase of cashier checks, he responded, "No, we don't know." (T/M 144). And there was no evidence the defendant endorsed the cashier checks used in the purchase. (T/M 146).

3. Cross-examination demonstrated a tragic fact. Without McDermott's drafting of the grand jury testimony and control over the witness as it was read, Lori Guinan would not have been able to testify to any facts concerning unit 3805. A quote from her testimony best demonstrates this: "I don't know Michael's financing arrangements for unit 3805." She never saw cash used in the purchase, or had any personal knowledge about the purchase or ownership. No independent evidence corroborated her generalized statement, which was, in reality, McDermott's interpretation of what happened. (T/M 150).

STATEMENT RESUMED:

The statement resumes at App. 24, Section E, with the witness describing the cash purchase of a condominium, Unit 5108, by the defendant with case. The Court of Appeals stated the corroboration for Unit 5108 was similar to that for 3805 (App. 13). By this the court meant that a title history as interpreted by agent McDermott showed that the defendant purchased the unit. The decision was silent as to the existence of corroborating evidence for the cash purchase of the unit. Following is virtually all the evidence proffered for corroboration:

1. McDermott testified that the title history of the unit showed that the defendant purchased the unit. No records

or documents were introduced into evidence. McDermott's testimony amounts to nothing more than his unfounded opinion of what title records purport to show. He also testified four cashier's checks were used in the purchase and they were traced to the defendant. (T/M 162).

2. Cross-examination of McDermott revealed neither he nor Lori Guinan had personal knowledge of how unit 5108 was purchased. (T/M 162-164). Reluctantly, he testified checks were used to purchase the cashier's checks and not cash. A check for $50,200, drawn on the defendant's personal checking account, was used to purchase one cashier's check; and another check for $65,000 was drawn on Mikkelrev Enterprises, Inc. checking account. Both checks were from legitimate sources and had no tax consequences. McDermott had no idea where the balance of $60,000 came from. (T/M 165).

3. The best evidence that corroboration of the grand jury testimony was a fiction created by McDermott can be seen at (T/M 166, 167, 168), where McDermott testified: "By Lori Guinan saying cash, I interpreted it to mean no mortgage." In spite of the foregoing, McDermott concluded cash was paid for unit 5108 and put that fact into the grand jury statement. His calculations were then used to charge defendant with spending $175,000 in cash in 1980.

STATEMENT RESUMED:

> Michael said that every time one writes checks, there is a record of it. He always said never leave a trail, and records left trails. Michael further stated that he knew how to get around the IRS.

CORROBORATION:

The Appeals Court found Lori Guinan's testimony regarding the defendant's intent was corroborated by the

statement of one of the defendant's former secretaries to the affect Guinan had remarked to her that he would "beat the IRS," and by the statement to another former secretary that she had helped Guinan destroy various records that might disclose receipts to the IRS (App. 14).

McDermott's testimony was hearsay within hearsay. The statements did not corroborate Lori Guinan's testimony which related to the maintenance of unit 5108. The secretaries alleged statement related to different years and different matters. Intent had to be proved for a conviction under 26 U.S.C. 7206(1). The grand jury testimony was the only direct evidence of defendant's intent.

REASONS FOR GRANTING THE WRIT

1. THE ADMISSION OF THE GRAND JURY TESTIMONY VIOLATED THE FEDERAL RULES OF EVIDENCE, RULE 804(b)(5).

The Appeal Court's ruling represents a dramatic deviation from, and is in conflict with, decisions of other courts of appeal. Moreover, the decision has departed from the accepted and usual course of judicial proceedings to the extent that it has impacted profoundly on the underpinnings of the entire judicial system. If the decision is allowed to stand, the abrogation of Sixth Amendment rights will usher in a wave of criminal and civil trials by affidavit, deposition, and grand jury transcript. For, if the government has a legal right to try cases by affidavit, then so should the defendants.

At the core of the issue is the Appeal Court's revisionist interpretation of "circumstantial guarantees of trustworthiness" equivalent to those of statements within the specified exceptions to subsection (b)(1)-(b)(4)", Rule 804, Fed-

eral Rules of Evidence. The Court found the trustworthiness test was met by sufficient corroboration. Although the Court of Appeals designated in its decision the evidence which it stated provided corroboration, the court mysteriously failed to mention the quality or peculiar nature of that evidence. IRS agent McDermott's hearsay within hearsay testimony should have been addressed, particularly in light of the fact "guarantees of trustworthiness" and "indicia of reliability" rested upon it.

Objection to the admission of the grand jury testimony was advanced on behalf of defendant in the district court and on appeal on a number of grounds, including Rule 804 and the Confrontation Clause of the Sixth Amendment. We will deal with the specifics of each in separate sections because it is clear that the Hearsay Rule and Confrontation Clause are not coterminous, even in criminal cases.

This Court has vigorously defended an accused's right to confront and cross-examine, viewing cross-examination as a technique for ascertaining truth in a civilized fashion. We suggest that no case could make the true application of this principle more pertinent than one involving the conclusory and imprecise statements of an estranged and divorcing wife whose hearsay grand jury testimony was corroborated by an over-zealous IRS agent by hearsay within hearsay. The question must be asked, why should the defendant be denied his Sixth Amendment right to confront and examine Lori Guinan? The record is void of evidence to show he waived the right by causing the unavailability of the witness. The transcript was crucial to a finding of guilt and devastating to him; it permeated every aspect of the trial. The only answer for the abrogation of a constitutional right is that the prosecutor needed the testimony to support his case (see dialog between prosecutor and trial judge, App. 15).

It has been frequently observed that the Confrontation Clause and the Hearsay Rule have their origins in the same history and reflect many of the same concerns. *Dutton v. Evans*, 400 U.S. 74. Both reflect the attempt to prevent trial by affidavit. Both recognize the importance of cross-examination in insuring that the results reached in judicial proceedings are true. Both protect our system against the excesses which, history teaches, are sure to follow when the rules are relaxed sufficiently to permit their appearance.

The dangers implicit in radical departure from the Hearsay Rule—as exemplified by the ruling in the instant case—have seldom been more pointedly discussed than in Chief Justice Marshall's 1813 opinion in *Queen v. Hepburn*, 7 Cranch 290. The case involved human freedom in its most pristine form. The Chief Justice noted that hearsay is not excluded solely because "better" evidence may exist; it is excluded because of ". . . its intrinsic weakness, its incompetency to satisfy the mind. . . , and the frauds which might be protected under its cover. . ." 7 Cranch 290, 295.

Any consideration of the instant case under Rule 804(b)(5) must begin with the recognition of the factors the rule requires the proponent of evidence to establish as preconditions to admissibility. Among these, unavailability and materiality are not contested here. The main issue concerns the reliability and trustworthiness of the grand jury testimony. The rule requires *circumstantial guarantees of trustworthiness equivalent to those supporting evidence under the first four subdivisions* codifying the traditional hearsay exceptions. Subsection 5, however, goes on to require that the evidence be more probative of the proposition it is offered to prove than any other available evidence. The standard of reliability is high and the burden a proponent must meet to establish it heavy. The available support for the reliability of the transcript of Lori

Guinan's grand jury testimony ranges from sparse to fictional.

The first four subsections of Rule 804 rely on guarantees of trustworthiness like cross-examination and belief of impending death. (Subsections 1 and 2). Statements against interest are included because individuals are unlikely to falsify when it is to their advantage to tell the truth. Similarly, statements regarding pedigree and genealogy are naturally unlikely areas for falsification. What equivalent guarantees surround the grand jury testimony of an estranged and divorcing wife?

In spite of the aura of untrustworthiness, the Appeals Court found Lori Guinan a trustworthy witness. After doing so, it turned its attention to the issue of corroboration, and through an exercise in revisionist rationale, the court deviated from the standard for corroboration established by all circuit courts and the Supreme Court. McDermott was not a non-interested witness who corroborated by independent evidence. He testified to matters which were told to him by others. And the best that can be said for this hearsay within hearsay is that it supported by remote consistency the grand jury witness' testimony. The fictionalized corroboration ought to be analogized with the corroboration presented in some of the leading authorities. In *United States v. Howard*, 774 F.2d 838 (7th Cir., 1985), the out-of-court declarant noticed a nameplate on an apartment door and then told both government agents and defense investigators about it. In *United States v. Boulahanis*, 677 F.2d 586 (7th Cir., 1982), Chiapas was a disinterested person, a mere bystander with no ax to grind, who testified from personal knowledge in response to questions. His testimony was corroborated at every point by tape recordings of conversations and other eyewitnesses to the event described, including co-defendant Scalisse. In *United States v. Barlow*, 693 F.2d 954 (6th Cir., 1982), the grand jury testimony of the

defendant's girlfriend was read into evidence at trial. She was given immunity, had no motivation to perjure herself, and she responded voluntarily to questions propounded by the prosecutor. And the witness' testimony was corroborated on all points by other independent and physical evidence. *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) involved grand jury testimony of a participant in a drug transaction under the surveillance of several DEA agents whose testimony corroborated the hearsay in every respect. The qualitative contrast between the evidence involved in these cases and Lori Guinan's grant jury testimony is stark. And the difference directly concerns trustworthiness and reliability.

The recent Seventh Circuit decision in *United States v. Silverstein*, 732 F.2d 1338 (7th Cir., 1984), although the issue arose under Subsection 3 rather than Subsection 5 of the Rule, indicates something of a standard by which trustworthiness ought to be measured. The evidence in that case, the exclusion of which the Seventh Circuit Court of Appeals affirmed, was *offered by the defendant, not the prosecutor.* The opinion pointed to the absence of real corroboration and the distinction between corroboration and mere consistency. Although the out-of-court statement in *Silverstein* was consistent with the objective facts, it was not supported by them. See 732 F.2d 1338, at 1347. The same kind of standard was utilized in *United States v. MacDonald*, 688 F.2d 224 (4th Cir., 1982).

We must point up the importance of the distinction in *Silverstein* between independent corroboration of the proffered hearsay and other evidence which is merely consistent with it. The difference lies in the detail with which the independent evidence offered as corroboration really supports the truth of the hearsay statements. In this case independent detailed support for Lori Guinan's grand jury testimony is a fiction, even though McDermott did testify to facts which were, in some parts, consistent with the

testimony. The trial judge, in his statement of his decision to admit the evidence after the conclusion of the hearing on the pre-trial Motion *in Limine*, devoted only one paragraph to the question of corroboration. We repeat that paragraph at App. 26.

The comprehensive investigation by the IRS which was relied upon by the trial court and Court of Appeals is not detailed corroboration, but instead it is precisely the kind of mere consistency dealt with in *Silverstein*. The diligent efforts of the IRS to determine whether or not Lori Guinan's statements were truthful are really beside the point. The requirement in Rule 804(b)(5) of substantial guarantees of trustworthiness is not a pious exhortation to agents of the government to do the best they can.

Much of the effort of the prosecutors at the *in limine* hearing to corroborate Lori Guinan's statements involved proof from Agent McDermott that she had related to him during their conversations between her August phone call and her September Grand Jury appearance, substantially the same materials which he incorporated into the prepared statement she signed and repeated to the grand jury. The repetition of a statement by an out-of-court declarant on more than one occasion does not fortify the reliability of the statement. And it makes no difference if that repetition is made to an IRS agent, friend, or family member.

Later in the course of the trial the Judge indicated some reservations about the admissibility of the hearsay in the light of the just issued opinion in *United States v. Feldman*, 761 F.2d 380 (7th Cir., 1985), which had been called to his attention. Judge Hart reiterated his deep reservations about the form in which Lori Guinan's testimony was presented to the grand jury and the absence of independent corroboration. In response, the prosecutor referred to the "full day hearing," and challenged defense

counsel to point out inaccuracies between McDermott's memorandum of his conversations with Lori Guinan and the grand jury transcript.

On being assured that the government was prepared to take the appellate risk attendant upon the use of the testimony, the trial judge reaffirmed his pre-trial determination permitting it. (App. 20-26).

United States v. Gonzalez, 559 F.2d 1271 (5th Cir., 1977), involved the admissibility of the transcript of the grand jury testimony of a narcotics courier. His identification before the grant jury of the defendant as the source of supply of seized drugs was critical evidence in the case. Although he was granted immunity and although he testified in secret before the grand jury, the courier refused to testify at the trial, and suffered incarceration for contempt as a result. In that case, as in this, unavailability was clear. The Fifth Circuit reversed, nevertheless, discussing a number of factors centering about the trustworthiness of the hearsay. All of the pressures to which the declarant was subjected militated against his reliability. And the Court considered the procedural context of the grand jury testimony. The use of leading questions, coupled with short, affirmative answers, the absence of cross-examination and the very secrecy of the proceeding, all tended to render the hearsay more like a prosecutor's summation than the testimony of witness relating past facts from personal observation. The procedural context of the grand jury testimony in this case, while subject to all of the infirmities listed in *Gonzalez*, adds the additional factor that Lori Guinan simply read a statement previously prepared by the agent responsible for the case. Finally, the testimony in *Gonzalez* lacked the direct support of detailed corroborating evidence. The decision was explicitly predicated upon Subsections 3 and 5 of Rule 804(b). Confrontation Clause questions were explicitly reserved.

Special attention must be focused on the importance in each case of the particular hearsay evidence, the admission of which is questioned under the rule. There is a discernible pattern in the cases to require live testimony when the evidence is critical to the result in the case and to admit hearsay in instances involving the proof of less significant facts. Thus, in *United States v. Feldman*, 761 F.2d 380 (7th Cir., 1985), reference is made to the "devastating effect" of the prior depositions (page 388), while in such cases as *United States v. Boulahanis*, 766 F.2d 586 (7th Cir., 1982); *United States v. Howard*, 774 F.2d 838 (7th Cir., 1985), and *United States ex rel. Haywood v. Wolff*, 678 F.2d 455 (7th Cir., 1981), evidence less critical to a conclusion of guilt or innocence based upon the entire trial record was admitted.

In the instant case, the grand jury testimony permeated every aspect of the trial, had a devastating effect on defendant, and was critical to a conclusion of guilt. The Appeals Court failed to understand how the testimony impacted on the primary issue to be proven—expenditures by the defendant. It said: "Despite all this (alleged corroboration) Guinan argues that the crucial aspect of Lori Guinan's testimony—the amount of money she testified he had expended on various items—is not corroborated. . . . we do not believe that Rule 804(b)(5) requires that degree of corroboration." (App. 14-15). Just how critical the "amount of money" was to the government's case can be seen from the following table:

	1977	1978	1979	1980
OMITTED ADJUSTED GROSS INCOME AS CHARED IN INDICTMENT.	121,906	33,366	44,407	93,200
EXPENDITURES PROVEN BY GRAND JURY TESTIMONY.				
ALLOWANCE	9,100	9,100	9,100	9,100
TRIP EXPENSE			34,426	2,374
CASH USED FOR PURCHASE OF UNIT 3805	54,000			
CASH USED FOR PURCHASE OF UNIT				60,000

For the tax year 1977, the government charged the defendant with omitting from adjusted gross income $121,960. $63,100 of that figure was supported by the grand jury testimony. For the tax year 1978, the government charged $33,366 was omitted from AGI. $9,100 of that figure was based on the grand jury testimony. For 1979 the government charged the defendant omitted $44,407 from AGI and used the grand jury testimony to prove $34,426 of that figure. For 1980 the government charged $93,200 was omitted from AGI, and used the grand jury testimony to prove $71,374 in expenditures. A reasonable conclusion can be drawn that the grand jury testimony was the government's entire case.

2. THE ADMISSION OF THE GRAND JURY TESTIMONY INTO EVIDENCE VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"The accused shall enjoy the right . . . to be confronted with the witness against him. . . ."

The Appeal Court's decision affirming the admission of the grand jury testimony into evidence was based on a finding of "adequate indicia of reliability." (App. 16). The Confrontation Clause was not violated, it reasoned, due to the fact "the testimony was given voluntarily under oath and was substantially corroborated by other independent evidence". (App. 17). The Court cited *Ohio v. Roberts* as authority.

This opinion represents a dramatic and radical deviation from the "indicia of reliability" rationale mandated in *Ohio v. Roberts*. At the core of the Court's revisionist rationale is the finding of constructive corroboration, rather than the required corroboration by independent evidence. We have argued exhaustively hereinabove that the corroboration proffered by the government ranged between fiction and remote consistency. Thus, all of the arguments which we have advanced to support the exclusion of the proffered hearsay under Rule 804 apply with equal vigor to this argument to exclude pursuant to the Confrontation Clause.

Hearsay questions and confrontation questions are, of course, not identical. *Mattox v. United States*, 156 U.S. 237; *Dutton v. Evans*, 400 U.S. 74. They have, however, grown from the same roots and nutured many of the same values.

Two recent decisions by the Supreme Court discussed issues concerning confrontation and hearsay. *Lee v. Illinois*, 476 U.S. 350, 90 L.Ed.2d 514; and *Cruz v. New York*, 478 U.S. 250. Both cases involved the admission into evidence of post-arrest confessions of a co-defendant. In *Lee* the trial judge relied on the co-defendant's confession to fill several gaps in the State's case which could have made the difference between defendant's acquittal on one charge of murder and her conviction of a lesser included offense on another and the actual result of the case, con-

viction on two counts of murder involving separate victims. The rationale of the majority opinion in *Lee* is explicitly predicated upon the Confrontation Clause of the Sixth Amendment. The co-defendant who was tried alongside Lee did not testify and as a consequence, he was never cross-examined. His confession differed from Lee's in critical aspects having to do with prior planning, Lee's participation in one killing, and provoking circumstances surrounding the other. The two confessions, however, were consistent in their general outline of the events of the fatal evening. The State relied on *Ohio v. Roberts*, 488 U.S. 58 (1980), contending that the co-defendant was unavailable because of Fifth Amendment privilege and that his statement was reliable enough to warrant its admission. This Court held that the uncross-examined, out-of-court statement of the accomplice was "presumptively unreliable." The significance of the view of the Confrontation Clause outlined in *Lee v. Illinois* to the decision in this case hardly needs elaboration.[2]

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[2] The *Lee* opinion recognizes constitutional limitations, spelled out of the Confrontation Clause, upon the exception to the rule of *Bruton v. United States*, 319 U.S. 123, for so-called "interlocking" confessions. *Parker v. Randolph*, 442 U.S. 62. We appreciate that *Lee*, *Bruton*, *Parker* and the case overruled in *Bruton*, *Delli Paoli v. United States*, 352 U.S. 232, all involve more or less joint trials of co-defendants at least one of whom has given a confession admissible against him. The Confrontation Clause underpinnings of *Lee*, as distinguished from the other three cases, involved an accomplice's confession utilized as substantive evidence against the appealing defendant.

We support the view that decision turned upon admissibility as a constitutional question and not upon the viability of limiting instructions or nuances of trial procedure. Accordingly, *Lee* has direct application to the case at bar. And see *Krulewitch v. United States*, 336 U.S. 440. And in *Cruz v. New York*, this Court held firmly to the view espoused in *Bruton*, *Parker*, and *Lee* that out-of-court statements are not admissible against a defendant unless supported by sufficient indicia of reliability. The *Cruz* Court discussed the devastation and harmless error factors which we address herein above.

In instance after instance the Appeals Court, in its attempt to marshall corroboration and support for reliability, pointed to the general consistency of the statements in the grand jury transcript with the facts McDermott testified to at the *in limine* hearing. That illustrates precisely the concept we were aiming at when we distinguished between corroboration and consistency. We suggest as well that it was the precise target of this Court in *Lee*.[3]

And this Court discussed issues concerning confrontation and hearsay in *Ohio v. Roberts*, 488 U.S. 56 (1980). At a preliminary hearing in that case, the defendant called a witness who he apparently thought would prove exculpatory. Instead, the witness contradicted the basic factual tenets of the defendant's theory of the case. This Court summarized its standard for judgment in confrontation and hearsay cases as follows:

> "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. 56, 67 [footnote omitted].

[3] The importance of the right to cross-examine was addressed by this Court in three other cases: *Pointer v. Texas*, 380 U.S. 400; *Davis v. Alaska*, 415 U.S. 308; *Chambers v. Mississippi*, 410 U.S. 284.

CONCLUSION

Certiorari should be granted because the Court of Appeal's decision is in conflict with decisions from this Court and other Courts of Appeals that have considered the same matter. The Fourth, Fifth, Sixth, and Ninth Circuit Courts require the demonstration of "circumstantial guarantees of trustworthiness" for admission into evidence of a grand jury transcript under 804(b)(5). These circuits have interpreted trustworthiness to mean stringent independent corroborating evidence from a non-interested witness. In an exercise of revisionist jurisprudence, the Court of Appeals in this case found constructive corroboration sufficient.

Moreover, the decision of the Court of Appeals is in conflict with this Court's decisions concerning hearsay and the Confrontation Clause. This Court has always vigorously defended an accused's right to cross-examination and excluded from evidence out-of-court statements which are not so tested. While this Court has not directly addressed a Rule 804 issue, in similar and related issues concerning the Confrontation Clause, out-of-court statements have been held "presumptively unreliable" absent stringent indicia of reliability." The revisionist view of the Court of Appeals in this case requires an exercise of the Court's power of supervision.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2866

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL J. GUINAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 CR 346—**William T. Hart**, *Judge.*

ARGUED SEPTEMBER 24, 1986—DECIDED JANUARY 7, 1988

Before WOOD, JR., COFFEY, and RIPPLE, *Circuit Judges.*

COFFEY, *Circuit Judge.* Defendant-Appellant, Michael J. Guinan, appeals his conviction of six counts of filing false income tax returns, in violation of 26 U.S.C. § 7206(1), and two counts of fraudulent use of social security numbers, in violation of 42 U.S.C. § 408(g)(2). We affirm.

I. Background

On April 26, 1984, a four-count indictment was filed charging the defendant with filing false income tax returns for the tax years 1977, 1979, 1980, and 1981, in violation

of 26 U.S.C. § 7206(1).[1] On August 16, 1984, Guinan's longtime paramour and wife of seven months, Loretta Clarke Guinan ("Lori Guinan"), telephoned IRS Special Agent Patrick McDermott, told him that she and her husband had become estranged and she had filed for a divorce, and indicated that she wanted to provide evidence about Guinan's finances. During the remainder of August and early September, Lori Guinan met or spoke with Agent McDermott at least ten times. Although some of the information provided by Lori Guinan was self-incriminating, she was not promised immunity; she was told, however, that her cooperation would be considered in deciding whether she would be prosecuted. Based on his notes of his interviews and telephone conversations with Lori Guinan, McDermott prepared a written statement. Lori Guinan reviewed the statement three times. She went over the statement with Agent McDermott on September 19, 1984 for one-half hour, and again on September 20, this time for an hour. Finally, later that day, Lori reviewed the statement for about two hours with an Assistant U.S. Attorney. She was allowed to make changes in the statement and did make some minor revisions. Lori Guinan then signed the statement and read it under oath before a grand jury on September 20, 1984. In her grand jury testimony, Lori Guinan identified herself as the wife of Michael J. Guinan and stated that she was separated from and planning to divorce him. She stated that she had known Guinan since June 1976 and testified to various

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[1] Section 7206 of Title 26 of the United States Code provides, in pertinent part:

> "Any person who—
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> (1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .
>
> shall be guilty of a felony . . . ."

aspects of Guinan's expenditures and financial arrangements between that time and 1984. The next day, September 21, 1984, a superceding indictment was filed against Michael Guinan adding two counts of filing false tax returns for the tax years 1978 and 1982.

After her grand jury appearance, Lori Guinan met with Agent McDermott approximately five more times; she never recanted her testimony. During this time she retained an attorney and was promised immunity. McDermott last saw Lori Guinan on November 2, 1984. On November 6, Lori Guinan disappeared. After attempting unsuccessfully to locate her, on November 30, 1984, the U.S. Attorney's office gave notice to defendant's counsel that it intended to offer Lori Guinan's testimony at trial pursuant to Fed. R. Evid. 804(b)(5),[2] an exception to the hearsay rule.

On December 27, 1984, the defendant failed to appear for trial, and a warrant for his arrest was issued. Guinan was apprehended in California in April 1985. In May of 1985 a second superceding indictment was filed adding two counts

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[2] Rule 804(b) of the Federal Rules of Evidence provides, in part:

"*Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

of perjury, in violation of 18 U.S.C. § 1623,[3] one count of failure to appear, in violation of 18 U.S.C. § 3146(a)(1),[4] and four counts of fraudulent use of social security numbers, in violation of 42 U.S.C. § 408(g)(2).[5]

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[3] Section 1623 of Title 18 of the United States Code provides, in part:

> "(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[4] Prior to November 10, 1986, § 3146 of Title 18 of the United States Code provided, in part:

> "(a) *Offense.*—A person commits an offense if, after having been released pursuant to this chapter—
>
> (1) he knowingly fails to appear before a court as required by the conditions of his release . . . ."

[5] Section 408 of Title 42 of the United States Code provides, in part:

> "Whoever—. . .
>
> (g) for the purposes of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose—. . .
>
> (2) with intent to deceive, falsely represents a number to be the social security account number assigned by the Secretary to him or to another person, when in fact such number is not the social security account number assigned by the Secretary to him or to such other person . . .
>
> shall be guilty of a felony . . . ."

On June 18, 1985, the government filed a motion to admit the grand jury testimony of Lori Guinan. The defendant responded with a memorandum of law in opposition to the government's motion, and a hearing was held on June 26, 27, and 28, 1985 regarding the admissibility of Lori Guinan's testimony under Rule 804(b)(5).

The trial court, ruling orally at the conclusion of the hearing, found Lori Guinan's grand jury testimony admissible. In reaching that conclusion, the court found that: 1) notice to the defendant was adequate; 2) the government had made a satisfactory showing that the witness was unavailable;[6] 3) the statement contained evidence of facts material to the government's proof that the defendant's income was falsely reported on his tax returns; 4) due to Lori Guinan's relationship with the defendant, her statement was more probative than any other available evidence; 5) the interests of justice warranted admission of the statement into evidence; and 6) the corroboration offered in support of the statement was "substantial", and the statement was made voluntarily and under oath. The court also found that the defendant's counsel had ample opportunity to cross-examine Agent McDermott at the hearing regarding the grand jury statement and the circumstances under which it was prepared. Although the court expressed some concern about the form of the grand jury testimony—a statement previously prepared by Agent McDermott and read verbatim—it found that that format was used in order to organize material developed over a period of time.[7] In sum, the court concluded that the requirements of Rule 804(b)(5) were met, and the grand

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[6] The parties stipulated in the trial court that Lori Guinan was unavailable for purposes of Fed. R. Evid. 804 and the Confrontation Clause of the Sixth Amendment.

[7] At oral argument, defendant's counsel indicated that the defendant does not object to the form of the grand jury statement, stating that there is nothing unusual about it. We therefore do not consider what effect, if any, the form of the testimony might have on its admissibility under Rule 804(b)(5).

jury testimony was admissible under that Rule. The court did, however, excise portions of the statement that it found conclusory, irrelevant, or unduly prejudicial.

At the defendant's trial, the redacted version of Lori Guinan's grand jury testimony was read to the jury by a female Special Agent of the IRS. The jury convicted Guinan of six counts of filing false income tax returns, two counts of fraudulent use of social security numbers,[8] and one count of failure to appear. Guinan received an aggregate sentence of sixteen years in prison.[9]

On appeal Guinan does not challenge his conviction on the charge of failure to appear, but argues that his conviction on all of the other counts should be reversed because the admission of Lori Guinan's grand jury statement violated both the Federal Rules of Evidence and his Sixth Amendment right to confront the witnesses against him.

II. Rule 804

Guinan contends that the trial court's admission of Lori Guinan's testimony violated the Federal Rules of Evidence. In support of that contention, he argues, first, that the admissibility of grand jury testimony must be determined under Rule 804(b)(1), rather than 804(b)(5).

Rule 804(b), under the heading, "*Hearsay exceptions,*" lists types of statements not excluded by the hearsay rule if, as in this case, the declarant is unavailable as a witness. The first four subsections of Rule 804(b) list specific

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[8] The remaining two social security counts were severed and dismissed prior to trial. Guinan was acquitted by the jury on the two perjury counts.

[9] The district judge imposed a sentence of thirty months in prison on each of the six false return counts, those sentences to run consecutively to each other, for an aggregate of fifteen years in prison; the judge imposed a sentence of one year imprisonment on the failure to appear count and each of the two social security counts, those sentences to run concurrently with each other but consecutively to the six false return sentences.

categories of statements excepted from the hearsay rule, namely: 1) former testimony; 2) statements under belief of impending death; 3) statements against interest; and 4) statements of personal or family history. Rule 804(b)(5) then sets out a catch-all exception for "statement[s] not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness," provided the other requirements of subsection (b)(5) are met. The defendant argues, essentially, that since the statements at issue here consist of grand jury testimony, they fall into the general category of "former testimony," and *are* "specifically covered by" exception (b)(1);[10] therefore, he argues, their admissibility must be tested only under that subsection, rather than under the catch-all provision, (b)(5). The government responds that the defendant waived this argument by failing to raise it before the trial court. In his reply brief, defendant points out that he did raise the issue in his memorandum in support of his motion *in limine* to exclude Lori Guinan's testimony. There, Guinan asserted, *inter alia*, "It is illogical to argue that the Federal Rules (804(b)(1) [sic] provide specifically that grand jury testimony is not admissible [sic] due to lack of confrontation, and then turn to 804(b)(5) and argue it is admissable [sic] under a general catch-all 'exception' rule." Defendant did not press the argument at the hearing six months later. Assuming that this sufficed, nonetheless, to bring the issue to the trial court's attention, this court has already decided it adversely to the defendant. In *United States v. Boulahanis*, 677

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[10] Rule 804(b)(1) of the Federal Rules of Evidence provides:

"*Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

F.2d 586, 588 (7th Cir.) *cert. denied*, 459 U.S. 1016 (1982), we explicitly stated, "Since grand jury transcripts do not come within one of the specific hearsay exceptions in Rule 804, they are admissible if at all only under the stringent criteria of 804(b)(5), the catch-all provision."[11] The trial court therefore properly considered the admissibility of the grand jury testimony under Rule 804(b)(5).

The defendant also contends, however, that even if Rule 804(b)(5) provides the proper test, the court erroneously concluded that Lori Guinan's grand jury testimony met its requirements. In particular, he argues that the statement does not have "circumstantial guarantees of trustworthiness" equivalent to those of statements within the specified exceptions of subsections (b)(1)-(b)(4). We disagree.

"A trial judge has considerable discretion, within the parameters of the rules of evidence, in determining whether . . . hearsay statements contain the necessary circumstantial guarantees of trustworthiness. See *United States v. Howard*, 774 F.2d 838, 845 (7th Cir. 1985); *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979)." *United States v. Vretta*, 790 F.2d 651, 659 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986). We find no error in the trial judge's exercise of that discretion.

In *Boulahanis*, this court affirmed the trial court's admission of the grand jury testimony of an unavailable declarant under Rule 804(b)(5). We found the requirement of "equivalent circumstantial guarantees of trustworthiness" satisfied because the declarant: 1) had testified before the grand jury under oath and subject to prosecution

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[11] In his opening brief on appeal, defendant's counsel admits that, in *Boulahanis*, we considered the admissibility of grand jury testimony under Rule 804(b)(5). Indeed, since counsel also represented one of the defendants in *Boulahanis*, he goes on to inform us that the same argument he makes here was made, and rejected by the court, in that case. Yet, apparently believing that we gave the argument short shrift in that case, he invites us to reconsider it. Given our explicit statement in *Boulahanis* disposing of the issue, we decline the invitation.

for perjury; 2) had not been pressured to testify; 3) was disinterested—"a mere bystander, with no axe to grind"; and 4) had given testimony that was corroborated by a tape of the conversation, and by testimony of eyewitnesses. *Boulahanis*, 677 F.2d at 588. On appeal, the defendant argues that the guarantees of trustworthiness present in this case are not equivalent to those noted by the court in *Boulahanis*. He focuses on the last two factors listed: the witness' lack of a personal interest and the degree of corroboration of the testimony.[12]

We note first that, although we rely on our previous decision in *Boulahanis*, we do not suggest that the factors listed there are all either exhaustive or necessary prerequisites to admissibility under Rule 408(b)(5).[13] Every case must be analyzed on its own facts. *See, e.g., Howard*, 774 F.2d at 845-46 (relying on factors other than those listed in *Boulahanis*). Thus, for example, we have found hearsay statements admissible despite the fact that the unavailable declarant was not a disinterested bystander. *See Vretta*, 790 F.2d at 656-59 (declarant was the murder victim and had himself been under investigation by the District Attorney's office).

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[12] Defendant may also be making an oblique attack on the first factor listed (testimony under oath and subject to prosecution for perjury) when he attempts, in his brief, to analogize Lori Guinan's testimony to the out-of-court affidavit found inadmissible by the Fourth Circuit in *United States v. McCall*, 740 F.2d 1331 (4th Cir. 1984). The evidence admitted in this case was, in fact, testimony given before a grand jury, with all the formality that that entails; it was given under oath and subject to prosecution for perjury.

[13] Some courts have relied on other circumstances to determine the trustworthiness of hearsay testimony. Some of them are present in this case. For example, Lori Guinan related only facts within her knowledge and personal observation, and she never recanted her testimony. *See United States v. Marchini*, 797 F.2d 759, 763-64 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1288 (1987); *United States v. Barlow*, 693 F.2d 954, 962 (6th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983). The district court, however, did not rely on these additional factors, and we find it unnecessary to do so to reach the conclusion that the testimony at issue was admissible.

The crucial question in considering the effect of Lori Guinan's personal interests on the admissibility of her testimony under Rule 804(b)(5) is not whether she was a "mere bystander" but whether she had a motive to lie that calls the trustworthiness of her statements into question. The defendant speculates that Lori Guinan had two such motives—vindictiveness due to the failure of her marriage and a financial interest in overstating her husband's assets. We admit that this argument gives us pause. Lori Guinan volunteered to give evidence against her husband, when, after only months of marriage, the two became estranged and she filed for divorce. Certainly, it seems plausible that her motive for volunteering to testify may have been personal vindictiveness. But it does not follow that any motive for volunteering to testify other than a pristine sense of civic duty is also an incentive to manufacture *false* testimony. Moreover, the grand jury statement read to the jury at trial included Lori Guinan's statement that she had filed for divorce so that the jury could take that fact into account in weighing the credibility of her testimony, and the defendant himself testified at trial and therefore had an opportunity to testify to any discord between himself and Lori Guinan that might have discredited her testimony. Considering these facts and the absence of any additional indication that the declarant had an interest in testifying *falsely*, we do not believe that the mere fact that the declarant volunteered to testify after her marriage to the defendant deteriorated so seriously calls into question the credibility of her testimony that admission under Rule 804(b)(5) was erroneous.

Defendant does suggest, in conclusory fashion, that in this case there was an additional motive for Lori Guinan to testify falsely, claiming, "Her own pecuniary interests militate toward the exaggeration of Defendant's financial resources." It is not apparent to us, however, and the defendant does not explain, how Lori Guinan would have benefited by testifying as she did. As the government points out, her grand jury testimony was substantially limited to a period some years prior to her marriage and

largely concerned the defendant's expenditures rather than his assets. Moreover, it is unclear what the value of a federal conviction for filing false tax returns for tax years prior to the parties' marriage would be in proceedings in a state divorce court. We are, therefore, unpersuaded by defendant's argument that Lori Guinan's "pecuniary interest" so seriously undermines the trustworthiness of her testimony that it is inadmissible under Rule 804(b)(5).

This brings us to defendant's main contention, namely, that Lori Guinan's testimony was insufficiently corroborated. He relies on the distinction, drawn by this court in *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985), between "corroboration" and "mere consistency."

This case, however, is both legally and factually distinguishable from *Silverstein*. First, in *Silverstein* the court was not called upon to address the admissibility of prior testimony under subsection (b)(5) of Rule 804. The issue was the admissibility of a statement against interest under subsection (b)(3) in the particularly "suspect" circumstances, *see id.* at 1346, where a statement inculpates the declarant and exculpates a criminal defendant. Rule 804(b)(3) explicitly states that such testimony "is not admissible unless corroborating circumstances *clearly* indicate the trustworthiness of the statement." (Emphasis added.) Thus, while the court in that case did emphasize the distinction between evidence which is "*clearly* corroborative" and that which is "merely consistent," *Silverstein*, 732 F.2d at 1347 (emphasis in original), it is not clear that it was applying the same standard of corroboration as we apply under Rule 804(b)(5).

Moreover, even if the legal standard applied is the same, *Silverstein* and the present case are not comparable factually. In *Silverstein* the *only* evidence offered to corroborate the declarant's confession to the murder of a fellow-inmate was "the mere fact that [the declarant] was out of his cell shortly before [the victim's] corpse was discovered." *Id.* at 1347. The court indicated that the require-

ment of clear corroboration would have been satisfied if "there was other evidence linking [the declarant] to the crime." *Id.*

In this case there is substantial other evidence linking the defendant to the expenditures that Lori Guinan testified he had made. Independent evidence was introduced at the June 26-28 hearing that corroborated Lori Guinan's testimony that the defendant supported her and gave her an allowance and grocery money, that they traveled extensively, and that the defendant, through various financial arrangements, purchased two condominiums during the relevant period. Moreover, independent evidence was introduced regarding the defendant's intent in filing false tax returns.

Lori Guinan's testimony that the defendant supported her and gave her an allowance and grocery money was corroborated by the fact that she never filed an individual income tax return, that there was no substantial activity in her personal bank account, that she stated to her parents and in a loan application that the defendant was her sole source of support, that checks payable to Lori were drawn on bank accounts associated with Guinan, that checks payable to Treasure Island Stores, (where Lori testified she did most of her grocery shopping) were drawn on the defendant's account, by the statements of a secretary-receptionist in the defendant's office to the effect that Lori came to the office to get cash from Guinan, and by the statement of the defendant's law clerk that Lori had complained to him that she was not receiving a sufficient allowance. Lori Guinan's testimony regarding the couple's extensive travels was corroborated by the logbook for one of the defendant's boats, by the defendant's own sworn statement in a divorce proceeding, by entries on a calendar kept by the defendant's ex-wife, by telephone records of the defendant's office showing collect calls from the Caribbean, by credit card records, and by the statements of the defendant's receptionists, secretaries, law clerk, and friends.

Lori Guinan's testimony regarding the purchase of the two condominiums was corroborated by the title history of one of the units (Unit 3805, Harbor Point Condominiums), which showed that title passed in 1977 to a trust whose beneficiaries were Samuel M. Matyas and Michael Guinan, and then, in 1980, through a "straw man" to a trust whose sole beneficiary was Guinan. There was evidence that the defendant obtained a mortgage on the property, and the funds generated, though payable to Matyas, were traced only to Guinan. The unit was purchased primarily with cashier's checks obtained from four Chicago banks on a date on which the defendant had gone to one of his safe deposit boxes, and an overpayment into escrow in connection with the purchase was endorsed and cashed by the defendant. Although Samuel Matyas was listed in trust documents as the owner of the unit, labor union records, tax returns, a loan application, and documents filed in Matyas' divorce proceeding do not indicate that the property ever belonged to Matyas. Moreover, the statements of the defendant's law clerk, his former secretary, and a member of the Harbor Point Condominium Association indicate that Guinan lived in the condominium under the name of Samuel Matyas, and Lori Guinan's dental records and driver's license were in the name "Lori Matyas". According to a receptionist in the defendant's office, bills relating to the condominium were sent to Michael Guinan's office, and an attorney who rented the unit from the defendant in 1981 stated that she sent the rent checks to Guinan, not Matyas.

Lori Guinan's testimony regarding the second condominium, Unit 5108, was similarly corroborated. The title history of Unit 5108 shows that in 1980 the property was transferred to a trust whose sole beneficiary was Samuel Matyas, and in the event of Matyas' death, Michael J. Guinan. Guinan was given power of direction over the trust. The property was later transferred under fictitious names, which, according to both expert and lay opinion, the defendant signed on the deeds. Bank records showed that although Samuel Matyas' name was listed as payee,

Guinan purchased the four cashier's checks which were used to make a deposit on Unit 5108. Guinan also purchased all but one of the cashier's checks used to pay for the unit at closing; that check was requisitioned in the name of Guinan's ex-wife, but there was evidence that the signature was not hers and the name was misspelled. (Lori Guinan testified that she had purchased one cashier's check at the defendant's direction.) Moreover, Samuel Matyas' tax and employment records do not reflect his ownership of Unit 5108. However, money orders, cashier's checks and mortgage information relating to Unit 5108, together with documents bearing the names Samuel Matyas and Alfonse Gonzalez (one of the fictitious names under which the property was transferred) were found among Michael Guinan's papers. In addition, in 1981, a mortgage was obtained on Unit 5108 in the name of Alfonse Gonzalez. The funds were traced to a bank account in the name of Guinan's deceased half-brother, George Weber. When Guinan was arrested, he was carrying identification bearing the name "George Weber", and various law clerks, secretaries, and friends of the defendant knew him to use that alias. The money was further traced to Guinan, Moonraker (a corporation associated with the defendant), another "Weber" account, and to a purchase of $100,000 in Krugerrands by Guinan in the name of George Weber.

Finally, Lori Guinan's testimony regarding the defendant's intent was corroborated by the statement of one of the defendant's former secretaries to the effect that Guinan had remarked to her that he would "beat the IRS," and by the statement of another former secretary that she had helped Guinan destroy various records that might disclose receipts to the IRS.

Despite all of this, Guinan argues that the crucial aspect of Lori Guinan's testimony—the *amount* of money she testified he had expended on the various items—is not corroborated. At least in this case, where there is nothing facially suspicious about the amounts the witness testified to, and indeed many of them seem fairly conservative, we do not believe that Rule 804(b)(5) requires that degree

of corroboration. At oral argument, defendant's counsel admitted that a court cannot require that every detail of an item of hearsay testimony be corroborated before admitting it under Rule 804(b)(5); the proponent of the evidence will always be relying on "a little more" than is independently corroborated. The question, according to counsel, is "how much more?" We need not, and indeed cannot, provide a general answer to that question. We can and do, however, hold that the additional information contained in Lori Guinan's testimony that was not independently corroborrated—i.e., the exact dollar amounts—in the context of this case, did not go so far beyond that which was corroborated that the trial court's decision that the testimony was sufficiently trustworthy to meet the requirements of Rule 804(b)(5) was erroneous.

III. Confrontation Clause

The defendant finally contends that the admission of Lori Guinan's grand jury testimony into evidence violated the Confrontation Clause of the Sixth Amendment to the United States Constitution, which provides that in criminal prosecutions "the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Our determination that the grand jury testimony was admissible under Rule 804(b)(5) does not immediately dispose of the constitutional issue. For, while "the hearsay rules and the Confrontation Clause . . . 'stem from the same root,' . . . the two are not equivalent." *Vretta*, 790 F.2d at 660 (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)); *see also*, *United States v. Keplinger*, 776 F.2d 678, 695 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2919 (1986). Thus, evidence that is admissible under a hearsay exception may still be violative of the Sixth Amendment. On the other hand, although any use of hearsay testimony literally denies the defendant an opportunity to confront a witness against him if the hearsay declarant is unavailable to be cross-examined, this court "has been unwilling to hold that the admission of hearsay evidence is a per se violation of the confrontation clause." *Boulahanis*, 677 F.2d at 589.

Instead, in a case such as this, where the witness is unavailable, the court enquires whether the hearsay bears "sufficient 'indicia of reliability.' " *Keplinger*, 776 F.2d at 695 (quoting *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1986)).

On appeal, the defendant stresses the importance of cross-examination in testing the reliability of testimony. While we hardly disagree, it is also clear that the constitutional "test [is] 'not whether there was an opportunity for . . . cross-examination, but whether there are adequate indicia of reliability to justify the placement of the hearsay statement before the jury.' " *United States v. Feldman*, 761 F.2d 380, 387 (7th Cir. 1985) (quoting *United States ex rel. Haywood v. Wolff*, 658 F.2d 455, 463 (7th Cir.), *cert. denied*, 454 U.S. 1088 (1981)). Thus, even absent an opportunity for cross-examination, where the government has "made a strong 'showing of particularized guarantees of trustworthiness' concerning the statements," their admission is not barred by the Confrontation Clause. *Howard*, 774 F.2d at 846 (quoting *Ohio v. Roberts*, 448 U.S. at 66), *quoted in Vretta*, 790 F.2d at 660. "Under this Court's test derived from *Roberts*, statements are [constitutionally] admissible even where there was no cross-examination if it is clear (1) that the declarant actually made the statement in question; and (2) there is circumstantial evidence supporting its veracity."[14] *Feldman*, 761 F.2d at 387. Here, the challenged evidence consists of transcripts of grand jury testimony read at trial; the accuracy of the transcripts is not challenged. The first requirement is therefore met. The second requirement is satisfied as well. Given our previous discussion of the

[14] In his reply brief, the defendant suggests that the Supreme Court's recent opinion in *Lee v. Illinois*, 106 S. Ct. 2056 (1986), indicates that some higher standard of corroboration applies. That case, however, dealt with the particular problem of co-defendants' confessions, which the court termed "presumptively unreliable." The court there required indentity on all key points between the codefendants' statements because of the special problems inherent in that situation.

guarantees of trustworthiness present in this case—in particular, the fact that the testimony was given voluntarily under oath and was substantially corroborated by other independent evidence, *see Boulahanis*, 677 F.2d at 589—we conclude that the admission of Lori Guinan's grand jury testimony did not violate the Sixth Amendment.

IV. Conclusion

We are satisfied that there are present in this case sufficient indicia of trustworthiness to meet the requirements of both Rule 804(b)(5) and the Sixth Amendment. The defendant's convictions are therefore

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 7, 1988.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-2866 vs.

MICHAEL J. GUINAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 CR 346—**William T. Hart**, *Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

2. Rule 804(b) of the Federal Rules of Evidence provides in part:

> "*Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .
>
> (5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

GRAND JURY TESTIMONY

SECTION A
EXAMINATION BY MR. DURKIN:

"Q. Ma'am, would you state your name and spell your first and last names?
"A. My name is Lori Guinan. Lori is L-O-R-I. Guinan is G-U-I-N-A-N.
"Q. Ms. Guinan, you have been subpoenaed to appear before this Grand Jury; is that correct?
"A. Yes, it is.
"Q. In anticipation of your appearance here, you have helped to prepare and review a statement detailing your knowledge of Michael Guinan; is that correct?
"A. Yes, it is.
"Q. I'm going to ask you to read the statement to the Grand Jury, and by reading it you are swearing that everything contained in there is the truth to the best of your knowledge; is that correct?
"A. Yes, it is.
"Q. Do you have that statement in front of you?
"A. I do.
"Q. Can you read it, please.
"A. Okay.

'I, Lori Guinan, state in substance the following regarding Michael Guinan:

'I am presently married to Michael Guinan and have been so since January 1981.'

"Q. Let me stop you right here. Are you presently separated from him?
"A. Yes, I am.
"Q. Are you planning to divorce him?
"A. Yes, I am.

SECTION B

'I have known Michael Guinan since June of 1976. Since that time Michael has been my sole source of support, with the exception of a few modeling jobs I had during the years 1980-1982 and for which I received approximately $1,200 for each of the years stated. I also received approximately $600 in income during approximately the years of 1979 and 1980 from Right Temporaries, for which I did some work."

'Throughout the years I have known him, Michael Guinan has made various expenditures and some of them are summarized as follows:

'Vacation trips:

SECTION C

'Throughout the years 1977 through 1982, as well as in subsequent years, Michael Guinan paid for several vacation trips I have taken with him. These trips were generally in the Florida and the Caribbean areas. During this period of time Michael had two boats, the Mikkelrev II and III, which were used in conjunction with our trips.

'During Christmas 1977, 1978, 1980 and 1982, the vacations were on the boats, which were moored in the Fort Lauderdale area.

'During 1979 Michael Guinan and I were on four month-long vacations. These 1979 vacations, essentially, were portions of a boat trip with Michael from Fort Lauderdale, where the Mikkelrev III was moored, to the Caicos Islands and return. Ports visited on the boat trip include South Bimini, Grand Bahamas, Great Abaco Islands, Green Turtle Islands, Treasure Cay Island, Berry Islands, Great Harbor Cay, Nassau, Paradise Island, Exuma Islands, Cat Cay, Georgetown in the Exumas, Acklin Islands, Caicos Islands, and Haiti.

'Approximately every four weeks Michael and I flew back to Chicago because of his business and then returned to rejoin the vessel, which was moored en route, after Michael completed his business.

'At a very minimum on these trips Michael spent $600 in air fare and $40 in the taxi fares for each vacation. While we were in such ports as Nassau, Michael spent a great deal of money. The stays in such ports lasted, generally, ten days. On the average, we spent $120 for such supplies as liquor and groceries at least two times. Further, dinners for seven nights cost $100 or $120 per night. On the other nights we had dinner on the boat.

'Gambling for an average of seven nights for me cost Michael at least $400 per night. On one occasion, I remember that at Baccaret, I, at one point, was up $500 and then lost $1,500. Michael lost an average of $200 playing dice and another $200 playing blackjack per night and he gambled at least five to seven nights during the ten days visits.

'Lodging cost Michael an average of $100 to $150 per night and we stayed in the hotels for at least five days during each visit. On the other nights we stayed on the boat.

'On each visit, Michael spent at least $200 to $300 while shopping for clothes. Michael also spent $200 to $300 purchasing such items as T-shirts, lamps, jewelry and renting motorcycles.

'Michael also filled the boat's gas tank and the cost of the gas was a $400 average. Michael primarily paid these expenses with currency. Occasionally, Michael paid the expenses with credit cards. In total, these expenses ranged from approximately $7,000 to $8,000 per visit.

'In traveling on the vacations, Michael continually purchased gasoline. Gasoline bills never totaled less than $200, and, at times, I saw that Michael paid up to $500 for gasoline. The vessel, with good mileage, would use only three gallons a mile. Guinan, while boating, was filling the gas tank almost every day. The minimum charge was generally $400. Most of the purchases were made by Michael in different names. He used currency to make the purchases, and most purchases were made in the Bahamian areas.

'Other vacation expenses paid for by Michael included numerous air fares between Chicago and Fort Lauderdale or

Nassau, as well as expenses for such friends as Ray Berg and his girlfriend, who vacationed with Michael and I.

'Michael and I have also vacationed in Utah on skiing trips during 1979 and also vacationed in Mexico.

'Allowances:

'During the years 1977 through 1982 Michael gave me, on the average, $175 to $250 per week as an allowance. Michael usually paid currency to me. At times, Michael gave me the checks. The checks stemmed from Michael's corporations, Mikkelrev Enterprises, Milor Enterprises, and Moonraker Enterprises.'

'Per agreement with Michael, I did not use the allowances for grocery money or joint expenses with Michael, such as utilities. I used this money on such items as lunches and my clothing purchases.'

'Grocery money:

'Michael gave me $100 to $200 every ten days in currency for groceries. The grocery payments started in late 1979, when Michael moved into Unit 3805, 155 Harbor Drive, Chicago, with me. I primarily did the grocery shopping at two Treasure Island stores on the near north side of Chicago.

SECTION D

'Unit 3805:

'Michael purchased this condominium for my use and did so in 1977. At the time I needed a place to live and Michael said he was looking for a condominium. He said he was thinking of investing some money and he needed to hide some cash. Michael gave me instructions as to the cost and type of unit he desired, and I found Unit 3805.

'Michael purchased this condominium in the name of his friend, Samuel Matyas. I do not know Michael's financial arrangements in purchasing the residence. In 1980 Michael obtained a mortgage on his property. He did this because when his ex-wife got the property, she could not pay the mortgage and she would lose the property in foreclosure proceedings. I did not pay any rent or assessments on this property.

SECTION E

'Unit 5108, 1105 Harbor Drive, Chicago:

'Michael purchased this condominium in 1980 and did so in cash and without a mortgage. In purchasing this unit, Michael, in part, went to several banks, bought cashier's checks with currency, and purchased the checks in amounts less than that for which the banks are required to file currency reports with the Government. I purchased one of the cashier's checks used to purchase this condominium and did so with currency provided by Michael. I made this purchase at the Continental Bank.

'Michael subsequently obtained a mortgage on this residence from First Federal of Chicago, and did so in Alphonse Gonzalez' name. I believe that Michael usually made the mortgage payments with money orders and used currency to purchase the money orders. Michael said that every time one writes checks, there is a record of it. He always said never leave a trail, and records left trails. Michael further stated that he knew how to get around the IRS.

REASONS FOR TRIAL COURT'S ADMISSION OF GRAND JURY TESTIMONY

The trial court's ruling concerning corroboration:

> "The next, perhaps most important, factor to be considered is to what extent independent corroboration exists to indicate that the statement is truthful. I find that the IRS investigation was comprehensive and that there was a very diligent effort made to determine whether or not the principal statements which are to be considered were truthful, and with the corroborative testimony presented here, I find that substantial corroboration exists for that material which I would consider to be read to the Grand Jury." T.620.

* * * * *

There was no question that Judge Hart was deeply troubled by the issues presented concerning the admissibility of the Lori Guinan hearsay. He told counsel as much:

> "I have to tell you the case gives me some pause in relation to the grand jury testimony . . ." T.622.

And:

> ". . . [T]he question of confrontation and the nature of the testimony . . . gives me some apprehension about the propriety of the use of this grand jury testimony." T.623.

On the next morning the Court stated;

> "So, I do have to tell you that I am troubled by the manner in which the testimony was presented to the grand jury. Had it been in a question and answer form, at least I could evaluate it in that context with which we are, all of us, more familiar, and here it does appear to be a distillation prepared by an agent, and in good faith all around, I assume, and I am glad to observe, but nevertheless, it does have that deep infirmity in it, and I find that very troubling." T.630-631.

In response, the prosecutor reiterated the arguments first advanced at the hearing on the pre-trial Motion *in Limine*. He referred extensively to that hearing and complained:

> "[The prosecutor]: There is nothing in that statement that was not contained, in some form or another in those memos, at least 2 or 3 different times on many occasions."

Judge Hart asked the prosecutor:

> "[A]re you sure that you want this testimony or that you need it? . . . Does this testimony present the basis for calculations that are being presented to the jury, and is it necessary to make those calculations in order to present this case to the jury?"
>
> "Now, Judge, frankly the government is at a very large disadvantage at this point." T.632.

And:

> ". . . [B]ut we can't appeal from an adverse ruling at this point, Judge . . ." T.632.

The Court again questioned the government's need for the Grand Jury transcript in order to present its case to the jury. Judge Hart wanted to know whether a ruling in favor of the government on the admissibility on the transcript was necessary to its case. The prosecutor replied. "It is, Judge . . ." T.633.

Ultimately, the Court ruled for the government with these remarks:

> "It is a very close question, and one which has troubled me, and I have indicated to you why I am troubled. To some extent the government has the right to proceed to try the case the way it sees fit. There is some risk involved, I am sure you are all aware of that, when a ruling is close like this." T.643.

* * * * *

DISTRICT COURT JUDGMENT ORDER

United States of America
vs.
MICHAEL J. GUINAN

United States District Court
Northern District of
Illinois, Eastern Division
Docket No. 84 CR 346

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date September 20, 1985.

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL ALGIS BALIUNAS

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of, wilfully and knowing made and filed false United States individual income tax returns; knowingly failed to appear for trial before this Court as required by the conditions of his release on bond; and did with intent to deceive, falsely represented certain social security numbers, in violation of Title 26, U.S.C. § 7206(1), Title 18, U.S.C. § 3146(a)(1) and Title 42, U.S.C. § 408(g)(2), as charged in the superseding indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby remanded to the custody of the Attorney General or his authorized representative for imprisonment for a period of THIRTY (30) MONTHS on each of Counts One, Two, Three, Four, Five and Six to run consecutively to each other.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR on each of Counts Seven, Eleven and Twelve to run concurrently with each other, but are to run consecutively to the sentence imposed on Counts One through Six. Defendant informed of his right to appeal. Order original indictment and remaining counts of the superseding indictment are hereby dismissed. Order that the costs of the prosecution assessed against the defendant.

(The Clerk of the Court is directed to send copies of the Judgment and Commitment Order to the Illinois Attorney Registration & Disciplinary Commission and to the Executive Committee of this Court).

* * * * *

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ WILLIAM T. HART
U.S. District Judge

Date 9-20-85